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IN THE
COURT OF APPEALS OF INDIANA

SHAWN M. SIENER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 28A01-0707-CR-318
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable David Holt, Judge
Cause No. 28D01-0608-MR-436

October 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Shawn Siener appeals his aggregate seventy-year sentence for murder, Class B felony burglary, Class C felony burglary, Class D felony theft, and Class A misdemeanor cruelty to an animal. We affirm.

Issues

The issues before us are:

I. whether the trial court abused its discretion in sentencing Siener; and

II. whether his seventy-year sentence is inappropriate.

Facts

The evidence most favorable to the trial court's sentencing determination is that on August 9, 2006, Siener went to the home of Jana Moore for the purpose of selling marijuana to her three sons. After Siener arrived at the residence, the Moore sons attacked him. After the fight, Siener was paid $5 for a marijuana joint, and Siener and the Moore sons smoked it together.

Siener brooded about this incident for two days and decided he wanted to take revenge on the Moores. On August 11, 2006, he went to the Moore home, armed with two pistols and rifle, and intended to find Jana's sons and kill them. He first kicked in the door of a detached garage and went inside looking for the sons. When he did not find them there, he approached the house. He then shot and killed a dog that was chained outside the house.

Siener next entered the house and continued looking for the Moore boys. After failing to find them, Siener decided to steal some personal property he found inside the house, including compact discs and X-Box games. While Siener was carrying items to his vehicle, Jana arrived home. Siener did not know her, but he approached her car and told her about his earlier confrontation with her sons. When Jana indicated that she was going to call the police, Siener shot her twice, killing her.

Jared Enochs heard the gunshots and saw Siener driving away from the Moore home. Siener then called three friends, including Jared's older brother Jordan, and invited them to his house to see the new things he had obtained. Siener showed his friends some of the items he had stolen from the Moore home and also told them he had shot Jana. He also told Jordan to tell Jared "to not say anything," because he realized that Jared had seen him fleeing from the Moore home. Tr. p. 150. After Siener's friends left his house, they contacted police.

Police located Siener shortly thereafter and took him to the Linton Police Department, where Indiana State Police detectives interrogated him. During the interview, Siener admitted burglarizing the garage and home, stealing property he found in those locations, and to shooting Jana.[1] At some point during the interview, one of the interrogating officers falsely insinuated that Jordan Enochs admitted being present at the scene of the crime. The officer later testified that he was investigating the possibility that

[1] Unfortunately, Siener's videotaped statement to police was not transmitted to this court on appeal, although it was introduced as an exhibit below. Nevertheless, the parties appear to be largely in agreement as to what Siener said and what police asked him.

some of Siener's friends might have been involved in the crime. Siener apparently became belligerent in response to this insinuation and began telling police that, indeed, Jordan and several other friends were also involved in the crime, although he later admitted that he had acted alone. After the interview, Siener led police to a rural location where he had dumped all of the items he had stolen.

On August 12, 2006, the State charged Siener with murder, Class B felony burglary, Class D felony theft, and Class A misdemeanor cruelty to an animal. On November 29, 2006, the State filed an additional charge of Class C felony burglary, and also filed notice of intent to seek a sentence of life without parole ("LWOP"). The LWOP request was based on Siener's killing of Moore while committing or attempting to commit burglary. On January 16, 2007, Siener agreed to plead guilty to all of the charges, with sentencing left to the trial court's discretion. In exchange, the State agreed to dismiss the LWOP request.

The trial court conducted a sentencing hearing on May 18, 2007. At least part of the delay in sentencing was attributable to Siener being examined by a forensic psychiatrist, at Siener's request. The psychiatrist diagnosed Siener as suffering from depression, panic disorder, and borderline personality disorder. He also noted Siener's past abuse of marijuana and cocaine.

At the conclusion of the sentencing hearing, the trial court made a lengthy oral sentencing statement. It noted as aggravating circumstances the nature and circumstances of the offense(s), Siener's lack of remorse, and his history of marijuana usage and dealing. As mitigating, it noted Siener's lack of criminal history as reflected in no prior

convictions or juvenile adjudications, his psychological issues, and his guilty plea. It then imposed a sentence of fifty-eight years for murder, eleven years for Class B felony burglary, five years for Class C felony burglary, two years for Class D felony theft, and one year for Class A misdemeanor cruelty to an animal. The two burglary sentences and theft sentence were ordered to be served concurrent to each other, but consecutive to the murder sentence. The cruelty to an animal sentence was ordered to be served consecutive to other sentences, thus resulting in a total aggregate sentence of seventy years. After pronouncing sentence, the trial court also issued a detailed written sentencing statement that imposed an identical sentence and largely paralleled the oral sentencing statement, except that it did not mention Siener's lack of criminal history as a mitigating circumstance. Siener now appeals.

Analysis

Our supreme court recently provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

I. Abuse of Discretion

Siener does not argue the trial court failed to enter a "reasonably detailed" sentencing statement as required by Anglemyer. He does assert, however, that the trial court abused its discretion in identifying aggravating circumstances and failing to identify certain claimed mitigating circumstances. An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Id. at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing a sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Siener first contends the trial court erred in finding the nature and circumstances of the offenses to be aggravating. He asserts the trial court merely recited the elements of the offenses of which he was convicted in noting this aggravator. A material element of a crime may not be used as an aggravating factor to support an enhanced sentence. McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). However, the particularized circumstances of an offense, if detailed by a trial court, may properly be considered as aggravating factors. Id. at 589-90.

The trial court's oral and written sentencing statements reveal that it believed the facts of this case to be egregious because after the first incident at Moore's house between her sons and Seiner, which arose in the context of Seiner's dealing in marijuana,

Seiner planned his revenge over the next two days. He then went to the Moore home armed with three firearms with the intent to kill at least three persons—Jana's sons—but then killed Jana instead when she arrived home. It is well-settled that the advance planning of an offense can appropriately be considered as an aggravating circumstance. Bustamante v. State, 557 N.E.2d 1313, 1322 (Ind. 1990). That Siener instead killed the first person who arrived at the home does not make the killing any less egregious, even if Jana was not his original intended target. The trial court did not abuse its discretion in considering the nature and circumstances of this case to be aggravating.

Siener also contends the trial court erred in concluding that he lacked remorse for his crimes. To the contrary, he argues that there was substantial evidence that he was remorseful, and that the trial court should have considered his remorse to be a mitigating circumstance. "A trial court may find a defendant's lack of remorse to be an aggravating factor." Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003). "Remorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility." Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006). A trial court may find that a defendant lacks remorse, even if he or she pleads guilty, offers an in-court apology, and asserts that he or she has cried over the incident. See Pickens v. State, 767 N.E.2d 530, 534-35 (Ind. 2002).

Siener asserts that because he expressed remorse at sentencing and also purportedly during his statements to police, and because the psychiatrist who examined him related that he cried about the incident, that the trial court was required to find him to

be remorseful. The trial court, however, viewed the police interview and also observed Siener's demeanor firsthand in court and was in a far better position than this court to gauge the sincerity of Siener's purported remorse. We cannot say the trial court abused its discretion in rejecting Siener's claims of remorse and instead finding him to be unremorseful.

Siener next argues the trial court improperly overlooked his lack of criminal history as a mitigating circumstance. As noted, however, the trial court did recognize this as a mitigating circumstance in its oral sentencing statement but failed to note it in its written statement, while imposing precisely the same sentence in both statements. When reviewing sentences, we are to examine both the written and oral sentencing statements to discern the findings of the trial court. McElroy, 865 N.E.2d at 589. Neither statement is controlling, and if there is a conflict between the two we have the option of remanding for resentencing or to credit the statement that accurately pronounces sentence. Id.

In McElroy, the trial court properly noted the defendant's lack of criminal history in its oral sentencing statement but in its written statement incorrectly found as an aggravating circumstance that the defendant had a criminal history. Despite this discrepancy, our supreme court affirmed the sentence, noting that both the oral and written statements concluded by imposing precisely the same sentence. See id. at 590-91. McElroy applies directly to this case; to the extent the trial court might have committed error in omitting Siener's lack of criminal history as a mitigator in the written statement, such error was harmless, given the oral statement's mention of it. See id.

Siener also claims that the trial court should have recognized his age—twenty-one—as a mitigating circumstance. A defendant's age is neither a statutory nor automatic mitigating circumstance. Rose v. State, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004). When a defendant is in his or her teens or early twenties, chronological age is only the starting point. Id. "What really must be determined is whether the young offender is 'clueless' or 'hardened and purposeful.'" Id. (quoting Monegan v. State, 756 N.E.2d 499, 504 (Ind. 2001)). We would add that, as with remorse, the trial court is in a position to conduct a first-hand assessment of the defendant's maturity, unlike this court.

To the extent Siener contends his age automatically should have been considered a mitigating circumstance, he is incorrect. Furthermore, the trial court's implicit conclusion that Siener was more "hardened and purposeful" rather than "clueless" when he committed these crimes is supported by the record. The trial court did not abuse its discretion in refusing to consider Siener's age as a mitigating circumstance.

Finally, Siener contends the trial court erred in stating that the shooting of the dog was a separate act of criminal conduct that warranted his sentence for cruelty to an animal to run consecutive to his sentence for murder. Both he and the State frame this contention as whether the shooting of the dog and the shooting of Jana were a single "episode of criminal conduct" for purposes of Indiana Code Section 35-50-1-2. However, that statute places limits on consecutive sentencing for a series of non-violent offenses. Siener makes no argument that he was sentenced in violation of this statute.

Siener committed two senseless violent acts when he shot the dog and subsequently shot Jana. Obviously, the taking of a human life is much more serious than

the killing of a dog, as is reflected in the disparity in the sentences Siener received for murder and for cruelty to an animal. Regardless, it was proper for the trial court to consider Siener's commission of multiple, distinct violent acts to justify running his sentence for cruelty to an animal consecutive to his sentence for murder. "It is a well established principle that the fact of multiple crimes or victims constitutes a valid aggravating circumstance that a trial court may consider in imposing consecutive or enhanced sentences." O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001). In sum, we conclude the trial court did not abuse its discretion in sentencing Siener.

II. Appropriateness

Having concluded the trial court acted within its lawful discretion in sentencing Siener, we now independently assess whether his sentence is inappropriate under Appellate Rule 7(B) in light of his character and the nature of the offense. See Anglemyer, 868 N.E.2d at 491. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

Turning first to the nature of the offense, we already have indicated our agreement with the trial court that the facts of this case are egregious. Siener went to the Moore home on August 11, 2006, carrying three firearms and planning to kill three persons. When he failed to find the Moore sons at home, instead of leaving he decided to

burglarize the property and kill the family dog. When Jana arrived home, Siener did not hesitate to kill her, even though she had nothing to do with the August 9, 2006 drug-related incident that had angered Siener. Siener told police that he went to the Moore home with "vengeance . . . in my heart." Tr. p. 173. He acted alone and not under the influence or direction of anyone else in planning and carrying out these crimes.

Siener's character warrants more detailed discussion. As noted, Siener has no criminal history in the sense that he has never been convicted of any crime. However, there was evidence noted by the trial court that Siener had regularly used both marijuana and cocaine in the past and had engaged in marijuana dealing. Siener does not dispute the accuracy of that evidence. Thus, although Siener lacks an official criminal history, he was not leading a law-abiding life at the time of these crimes. This substantially discounts any positive reflection Siener's lack of criminal history might have had on his character. See Bostick v. State, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (holding trial court did not abuse its discretion in failing to give substantial mitigating weight to defendant's lack of criminal history where defendant abused illegal substances and also had sexual relationship with an underage boy).

Siener also argues at length that his mental health should figure into an assessment of his character and result in a reduction of his sentence. Our supreme court has held that there is a "need for a high level of discernment when assessing a claim that mental illness warrants mitigating weight." Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). This is because a recent study declared that nearly half of all Americans will be mentally ill at some point in their lives, as mental illness is defined in the American Psychiatric

Association's Diagnostic and Statistical Manual of Mental Disorders. Id. Factors to consider in weighing a mental health issue include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. Id.

Here, after pleading guilty, a forensic psychiatrist examined Siener and diagnosed him with depression, panic disorder, and borderline personality disorder. The doctor opined that the personality disorder in particular can be characterized by impulsivity, problems with anger control, and paranoia. He also stated that Siener's impulsivity and the stress of the attack on August 9, 2006 may have played a role in his shooting of Jana two days later. He concluded, "If he hadn't had borderline personality disorder I don't think he would have done this." Ex. A, p. 30. However, the doctor also clarified in his deposition cross-examination that planning to go to the Moore home with the intent to kill Jana's sons could not be described as impulsive.

Thus, by the psychiatrist's own testimony, the only one of Siener's crimes that might have a clear nexus with his mental health was his shooting of Jana. His overall plan of going to the Moore home, heavily armed and intent on revenge, was not substantially linked to his mental health. Furthermore, Siener told police that when he approached Jana, he "switched" from a .357 caliber handgun to a .40 caliber handgun because he "didn't want to miss." Tr. p. 173. This would seem to contradict an assertion that Siener's shooting of Jana was impulsive and a result of his being unable to control his behavior, rather than being calculated and in cold blood. We also see little in the record to suggest that Siener's overall ability to function or ability to discern right from

wrong was severely limited by his mental health. We conclude that although Siener's mental health issues might have had some connection to these crimes, it was not to an overwhelming degree.

Siener also claims he cooperated with the police, which reflects positively on his character. The extent of Siener's cooperation, however, is debatable. Although Siener did confess to having committed these crimes, he did not turn himself in to the police. Instead, he was taking steps to conceal his commission of the crimes before he was apprehended, including burning the clothes he had been wearing and dumping the items he had stolen in a rural area. Additionally, towards the end of Siener's statement to the police he falsely implicated several of his friends as accomplices in the crimes. Siener claims that he essentially was coerced by the police into making those allegations, but we need not credit that claim.

In a similar vein, Siener argues that his guilty plea requires a reduction of his sentence. We are mindful that courts must carefully assess the potential mitigating weight of any guilty plea. Payne v. State, 838 N.E.2d 503, 508 (Ind. Ct. App. 2005), trans. denied. One factor to consider in determining such weight is whether the defendant substantially benefited from the plea because of the State's dismissal of charges in exchange for the plea. See id. at 509. Here, in exchange for Siener's plea, the State agreed not to seek an LWOP sentence. As the State points out, because Siener pled guilty both to murder and Class B felony burglary, he admitted to the factual prerequisite for LWOP under Indiana Code Section 35-50-2-9(b)(1)(B). Instead of facing LWOP, however, by pleading guilty Siener was sentenced to a term of years and, in light of his

age and if he accrues good time credit while incarcerated, should be released well before the end of his natural life. Thus, Siener received a significant benefit from the guilty plea.

In sum, we reiterate that the nature of Siener's offenses is egregious, given the planning involved and what he intended to do, and the number of criminal acts he eventually ended up committing. There are some potentially "positive" aspects to Siener's character—including his lack of criminal history, mental health, and guilty plea—but we do not find these to be overwhelming either singly or in combination for the reasons we have discussed.[2] In other words, his character strikes us as neutral—neither decidedly "good" nor "bad." By pleading guilty to murder, Class B felony burglary, Class C felony burglary, Class D felony theft, and Class A misdemeanor cruelty to an animal, Siener faced a maximum sentence of ninety-seven years if he were to receive maximum, consecutive sentences.[3] The minimum he faced for minimum, concurrent sentences was forty-five years.[4] His sentence of seventy years falls in the middle of those extremes. In light of the nature of the offenses and Siener's character, he has failed to convince us that that sentence is inappropriate.

Conclusion

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[2] Mental illness is not, strictly speaking, a "positive" character trait. It can, however, weigh in a defendant's favor in assessing his or her character and whether a particular sentence is appropriate.

[3] Sixty-five years for murder, plus twenty years for a Class B felony, plus eight years for a Class C felony, plus three years for a Class D felony, plus one year for a Class A misdemeanor. See I.C. §§ 35-50-2-3(a), -5, -6(a), -7(a), 35-50-3-2.

[4] Forty-five years is the minimum sentence for murder. I.C. § 35-50-2-3(a).

The trial court did not abuse its discretion in sentencing Siener, and his aggregate seventy-year sentence is not inappropriate. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.